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No. 09-517

IN THE

Supreme Court of the United States

PACIFIC INVESTMENT MANAGEMENT COMPANY LLC AND PIMCO FUNDS,

Petitioners,

v.

RICHARD HERSHEY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF OF DRI – THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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November 30, 2009

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MOTION OF DRI – THE VOICE OF THE DEFENSE BAR FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

DRI – the Voice of the Defense Bar hereby requests, pursuant to Rule 37.2(b) of the Rules of this Court, leave to file the accompanying brief as *amicus curiae* in support of petitioners. DRI obtained the consent of petitioners. Petitioners' letter of consent has been filed with the Clerk of the Court. Respondents, however, withheld their consent from the filing of this brief in support of the petition.

DRI offers this brief because the issues to be decided affect the interests of DRI and its members.

DRI is an international organization that includes more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the availability, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys, their clients, and the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and – especially on national issues – consistent. DRI has previously filed *amici* briefs with the Court in cases concerning the civil justice system. See, *e.g.*, *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l*, No. 08-1198 (filed Sept. 4, 2009); *Mohawk Indus., Inc.* v. *Carpenter*, No. 08-678 (filed May 4, 2009); *Wyeth* v. *Levine*, 129 S. Ct. 1187 (2009) (filed June 3, 2008).

The questions presented by this case – whether and to what extent Fed. R. Civ. P. 23 permits the certification of classes that include uninjured plaintiffs and whether the burden can be placed on defendants to prove that the requirements of Rule 23 are not satisfied – are issues of recurring importance for DRI's members and their clients. DRI's members frequently are involved in putative class actions and it is critically important to them and their clients that Rule 23 not be interpreted in a manner that impermissibly affects and enlarges substantive rights. It is equally important to DRI's members and their clients that a uniform rule of law be applied across the country.

DRI therefore has a vital interest in the issues presented in this case, and its views can assist the Court in deciding whether certiorari should be granted. For the foregoing reasons, DRI's Motion for

Leave to File a Brief as *Amicus Curiae* in Support of Petitioners should be granted.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE* DRI[1]

Amicus curiae DRI – the Voice of the Defense Bar is an international organization that includes more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the availability, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys, their clients, and the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and – especially on national issues – consistent.

To promote its objectives, DRI participates as *amicus curiae* in cases that raise issues of vital concern to its membership, their clients, and the judicial system. This is just such a case. DRI believes that resolution of the important federal class action issues that the petition squarely presents is critical because the circuits have fractured over

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* DRI states that Sidley Austin LLP is one of the law firms that is representing petitioners in the district court. Sidley Austin's appellate group was retained by DRI to prepare this brief and the appellate attorneys who prepared this brief had no substantive discussions with the attorneys working on the litigation. Neither petitioners, nor any other entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received timely notice of *amicus curiae*'s intent to file this brief. DRI obtained the consent of petitioners. Petitioners' letter of consent has been filed with the Clerk of the Court. Respondents, however, withheld their consent from the filing of this brief in support of the petition.

whether and to what extent Fed. R. Civ. P. 23 permits the certification of classes that include uninjured plaintiffs and whether the burden can be placed on defendants to prove that the requirements of Rule 23 are not satisfied. These issues can have considerable, and even dispositive, impact in numerous types of class actions, including large-scale securities, antitrust, and commodities cases. Because class action certification is an issue of particular significance to defendants, DRI's members are frequently confronted with the precise issues raised by petitioners, and their clients are affected by the lack of a clear, uniform rule.

DRI opposes the standards adopted by the court of appeals that permit the certification of classes that include uninjured plaintiffs and that impose on defendants the burden of showing that class certification is improper. But what is of paramount importance now is that this Court grant review to resolve the conflict in the courts of appeals. Adoption of a uniform rule that governs all future federal class action certification proceedings is essential to prevent unseemly and unfair forum-shopping and to bring consistency and predictability to class action certification.

INTRODUCTION

Petitioners have presented a thorough statement of the case, which DRI will not repeat, and have demonstrated persuasively the split among courts of appeals on the issues presented, as well as various reasons why this Court should grant the petition. *Amicus* DRI believes that review of these issues is fully warranted for the reasons articulated by petitioners and submits this brief to highlight

significant additional reasons why this Court should grant certiorari.

This case squarely implicates well-defined splits of authority among the courts of appeals on how to interpret Rule 23. These conflicts present a compelling case for intervention by this Court because they fall squarely within the Court's traditional duty to ensure uniformity on issues of federal court procedure. The need for review is even more urgent because the court of appeals interpreted Rule 23 in a manner that is contrary to the clearly expressed purposes embodied in the 2003 amendments to the Rule and would impermissibly affect and enlarge substantive rights. If allowed to stand, the court of appeals' decision will fundamentally alter the operation of Rule 23 in the Seventh Circuit, as well as lead to unseemly and unfair forum-shopping. The Court should grant certiorari to prevent these results and to establish uniformity in an important area of federal procedure.

REASONS FOR GRANTING THE PETITION

I. THE CONFLICT CONCERNING WHETHER RULE 23 PERMITS THE CERTIFICATION OF CLASSES THAT INCLUDE UNINJURED PLAINTIFFS WARRANTS THIS COURT'S REVIEW.

As the petition demonstrates, the decision below squarely conflicts with the decisions of other circuits holding that class certification is not proper where some class members incurred no injury or even derived a net economic benefit from the same conduct that the named plaintiffs allege injured them. Pet. 11-15. Indeed, until the decision below, no circuit had approved certification of such a class. *Id.* at 12.

Here, the Seventh Circuit acknowledged that "some of the class members probably were net gainers from the alleged manipulation," but nevertheless upheld the district court's decision certifying a class action on the ground that it "has not yet been shown" that the class definition was "clearly" overbroad. Pet. App. 12a; see also *id.* at 13a (acknowledging that "the class definition may be too broad"). The Seventh Circuit offered its own speculation that not "many" of the class members were net gainers, *id.*, but it failed to address any of the trading data in the record which suggests – under the analysis of *plaintiffs'* own experts – that a *majority* of the class members were in fact net gainers. See Pet. 5. The court of appeals' ruling warrants review because it would impermissibly affect and enlarge substantive rights, and is unfaithful to the purposes of Rule 23.

1. The court of appeals' ruling improperly renders Rule 23 a vehicle for expanding substantive rights by permitting parties to participate in class actions, and obtain monetary or other relief, when they do not satisfy all of the essential requirements for asserting the underlying cause of action. This Court unequivocally has held that "Rule 23's requirements must be interpreted in keeping with Article III constraints, and . . . shall not abridge, enlarge or modify any substantive right." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 613 (1997) (internal quotation marks omitted); *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 845 (1999) ("[N]o reading of [Rule 23] can ignore the [Rules Enabling] Act's mandate that rules of procedure shall not abridge, enlarge or

modify any substantive right") (internal quotation marks omitted).[2]

The standard adopted by the Seventh Circuit, however, permits Rule 23 to do exactly that. As petitioners demonstrated, Pet. 16, injury or "actual damages" is an essential element of the private right of action under the Commodities Exchange Act ("CEA"), 7 U.S.C. § 25(a)(1). Stated differently, uninjured parties have no right to bring a private action under the CEA. By allowing such uninjured parties to participate in a class, the Seventh Circuit has applied Rule 23 to enlarge the substantive rights of those uninjured parties. When uninjured plaintiffs attempt to commence individual CEA actions in federal court, their meritless actions can readily be screened out at the motion to dismiss stage or after basic discovery. The certification of classes that include uninjured plaintiffs, however, leaves defendants without any practical or early means of identifying and eliminating uninjured plaintiffs. This expansion of the uninjured plaintiffs' rights – by giving them the ability to "free ride" on the legitimate claims of injured plaintiffs – is a result that not only contravenes the purposes of the Rules Enabling Act,

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[2] *See also McLaughlin* v. *American Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008) ("federal rules of procedure, such as Rule 23, cannot be used to abridge, enlarge or modify any substantive right") (internal quotation marks omitted); *Cummings* v. *Connell*, 402 F.3d 936, 944 (9th Cir. 2005) ("It is axiomatic that Rule 23 cannot abridge, enlarge or modify any substantive right of any party to the litigation") (internal quotation marks omitted); *Blaz* v. *Belfer*, 368 F.3d 501, 504 (5th Cir. 2004) ("A class action is merely a procedural device; it does not create new substantive rights") (internal quotation marks omitted).

but also wholly undermines the limits that Congress imposed on the private right of action.

It is no answer to suggest, as the court of appeals did, that uninjured plaintiffs can be eliminated at the damages stage of the class action. Pet. App. 7a-8a (suggesting that uninjured plaintiffs will either not submit claims for damages or will submit claims that ultimately will be rejected). For one thing, many – if not most – class actions never get that far. As petitioners demonstrated, and as even the court of appeals below acknowledged, the issue of class certification is of "touchstone importance" in complex civil cases because the certification of a putative class induces many defendants to settle. Pet. 1, 8, 30; see also Pet. App. 11a (acknowledging "the *in terrorem* character of a class action" and the pressure on defendants to "settle rather than to bet the company"). Indeed, the pressure to settle is even greater when the class is overbroad and defendants face potential liability to numerous uninjured plaintiffs. When a class action that includes uninjured plaintiffs results in a monetary settlement – as will often be the case – uninjured plaintiffs necessarily share in the settlement. This means that they recover under a statute that expressly was designed *not* to provide them with any cause of action, and from parties who did *not* injure them. This result is patently unjust and nothing in Rule 23 supports, much less requires, such an outcome.

Moreover, even in the infrequent case where a complex class action reaches a damages phase, and further proceedings theoretically could be used to screen out uninjured plaintiffs, defendants still would be required to bear the enormous effort and expense of litigating the overbroad class action to conclusion

and eliminating improper plaintiffs only at the final phase. In addition, overbroad class actions can impose substantial collateral burdens on defendants, such as adverse publicity that can harm their reputation and public disclosure obligations that can unfairly impact their stock price. The prospect of defendants having to bear these substantial costs and litigation burdens itself contravenes Congress's purposes in limiting the availability of the cause of action in the first instance to injured parties.

The litigation burden would be particularly onerous in cases like this one, where the existence of injury must be determined on a plaintiff-by-plaintiff basis. Indeed, when faced with the prospect of such individualized injury determinations, federal courts often conclude that class treatment is not appropriate. See, *e.g.*, *Alabama* v. *Blue Bird Body Co.*, 573 F.2d 309, 327-28 (5th Cir. 1978) (class may not be certified unless injury-in-fact can be established on a common basis); *Bell Atl. Corp.* v. *AT&T Corp.*, 339 F.3d 294, 302-03 (5th Cir. 2003); *Valley Drug Co.* v. *Geneva Pharms., Inc.*, 350 F.3d 1181, 1190-91 (11th Cir. 2003); *Pickett* v. *Iowa Beef Processors*, 209 F.3d 1276, 1280-81 (11th Cir. 2000). The Seventh Circuit's contrary conclusion here – that a class should be certified and injury determinations left for later case-by-case adjudication – demonstrates how far out of step it is with other circuits.

This issue extends far beyond class actions that arise under the CEA. The same issue arises under numerous federal statutes that require proof of injury

as an essential element of a private cause of action.[3] It also arises under putative Rule 23 class actions that are based on state statutes that require proof of injury as an essential element of a private cause of action, such as deceptive and unfair trade practice laws.[4] In addition, this issue is implicated in putative class actions involving state common law causes of action that require proof of injury, such as negligence and other theories commonly used in products liability class actions – a considerable category of large-scale cases in the federal courts. Indeed, given ever-expanding uses of Rule 23, it would be hard to find a more compelling example of a clear division in the circuits that affects numerous types of cases and, as a result, warrants this Court's attention.

2. Aside from the impact of the court of appeals' ruling on substantive rights, its interpretation of Rule 23 to permit named plaintiffs to obtain cer-

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[3] *See, e.g.*, 15 U.S.C. § 78u-4(b)(4) (elements of private securities fraud actions include a "loss" and "[l]oss causation"); 15 U.S.C. § 15(a) (private damages action under the antitrust laws is only available to a person "injured in his business or property" by reason of the alleged violation); 18 U.S.C. § 1964(c) (civil RICO action only available to a person "injured in his business or property" by reason of the alleged violation).

[4] *See, e.g.*, N.Y. Gen. Bus. Laws § 349(h) (private damages action under New York's deceptive trade practices law available to persons "injured" by reason of the violation); Mass. Gen. Laws ch. 93A, §§ 2, 9(1) (same for Massachusetts' deceptive trade practices law); 815 Ill. Comp. Stat. §§ 505/2, 505/10a (private damages action under Illinois' unfair trade practices law available to persons who suffer "actual damage" by reason of the violation).

tification of overbroad classes that include plaintiffs who ultimately cannot recover is contrary to the purposes of the Rule. As Rule 23 has evolved, a central purpose has been to prevent class litigation from going forward with overbroad and ill-defined classes that – after the expenditure of significant resources by the parties and the court – ultimately have to be narrowed, or even decertified.

For example, Rule 23 was amended in 2003 to remove the requirement that the court determine whether to certify a class "as soon as practicable after commencement of an action," and replace it with the requirement that the determination be made "at an early practicable time." See Fed. R. Civ. P. 23 cmt. to 2003 amendments. The Advisory Committee explained that the "as soon as practicable" requirement failed to capture "the many valid reasons that may justify deferring the initial certification decision." *Id.* In particular, "[t]ime may be needed to gather information necessary to make the certification decision." *Id.* In addition, Rule 23 also was amended in 2003 to eliminate "conditional" class certification. The Advisory Committee explained that "conditional" certification was being abolished because "[a] court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met." *Id.*

The purpose of both of these rule changes was to prevent named plaintiffs from seeking certification of classes that they know little about, and instead require them to investigate the potential plaintiff pool and seek certification of well-tailored classes that satisfy the requirements of Rule 23. The court of appeals' rule, however, will have the opposite effect. It permits named plaintiffs to seek and obtain

certification of very expansive classes of plaintiffs, before they have even come to grips with who was potentially harmed by a defendant's alleged conduct and who was not. This turns the class action device into a very wide net for hauling defendants into federal court, including defendants whom further inquiry will reveal should not have been there in the first place. At the very least, it increases the risk that district courts and parties will have to devote considerable time and resources to narrowing, subdividing or even decertifying classes that have been certified – an outcome that in many cases could have been avoided by careful inquiry in the first instance. The court of appeals' interpretation of Rule 23 therefore undermines the Advisory Committee's intent to ensure that class certification determinations are based upon adequate information so that the actions that are certified for class treatment are consistent with the purposes of the rule. For this reason as well, the Court should grant the petition.

II. THE CONFLICT CONCERNING WHETHER THE BURDEN CAN BE PLACED ON DEFENDANTS TO SHOW THAT CLASS CERTIFICATION IS IMPROPER WARRANTS THIS COURT'S REVIEW.

The petition also demonstrates that the decision below squarely conflicts with the decisions of other circuits holding that plaintiffs bear the burden of showing that class certification and the proposed class are proper under Rule 23. Pet. 20-21. Indeed, other courts of appeals have deemed it reversible error for the burden to be placed on a defendant to show that class certification is improper. *Id.* (citing *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1086 (6th Cir. 1996)); see also *Berger* v. *Compaq Computer Corp.*,

257 F.3d 475, 481 (5th Cir. 2001) (describing the district court's inversion of the burden of proof as "unquestionably . . . incorrect" and "unsettling"). Here, however, the court of appeals not only rejected petitioners' argument that the proposed class was too broad to satisfy the Rule 23 requirements on the ground that *petitioners* "failed to justify . . . the extent to which the class definition may be too broad," Pet. App. 13a, but further faulted petitioners for failing to "depose a random sample of class members to determine how many were net gainers from the alleged manipulation," *id.* at 14a.

This conflict warrants this Court's attention. As an initial matter, the Seventh Circuit's holding that defendants must *disprove* the appropriateness of class certification not only conflicts with the holdings of other courts of appeals, but also conflicts with decisions of this Court and with the uniform view of commentators. As petitioners noted, Pet. 20, this Court itself has held that "*parties seeking class certification* must show that the action is maintainable under Rule [23]," *Amchem*, 521 U.S. at 614 (emphasis added). Along with the other courts of appeals that have faithfully applied this Court's holding, commentators agree that plaintiffs have the burden of showing that all Rule 23 requirements are satisfied. See, *e.g.*, 7A Wright, Miller & Kane, *Federal Practice and Procedure: Civil* § 1759, at 122 (3d ed. 2005) ("The party who is invoking Rule 23 has the burden of showing that all of the prerequisites to utilizing the class action procedure have been satisfied"); 5 James W. Moore, *Moore's Federal Practice* § 23.83, at 23-383 (3d ed. 2009) ("The party seeking class certification has the burden of demonstrating that all the requirements for a class

action under Rule 23(a) and (b) have been met and that the action should be certified as a class action."); 3 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 7.17, at 59 (4th ed. 2002) ("The proponent of class certification bears the burden of showing that the action is proper for class certification."); 1 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 3:10 (5th ed. 2008) ("The burden of proving each of the requisite elements of Rule 23 is on the party seeking certification, and failure to prove any element precludes certification.").

It is not surprising that the Seventh Circuit stands alone on this issue because its standard undercuts the purposes of Rule 23. As noted, Rule 23 was amended in 2003 to eliminate "conditional" class certification. This change eliminated the ability of named plaintiffs to seek and obtain "conditional" certification of overbroad and ill-defined classes based upon cursory investigation of the potential class members, only to have the classes ultimately revealed to be unsuitable and decertified – after the expenditure of considerable resources by the trial court and the parties. The Seventh Circuit's inversion of the burden of proof, however, revives the evils of conditional certification because it permits named plaintiffs to seek certification of overbroad classes without proper inquiry, and then leaves it to defendants to prove how and why the classes are overbroad. The court of appeals' standard therefore wholly vitiates the intent of the Advisory Committee to place the onus on named plaintiffs to evaluate the potential plaintiff pool and then propose properly tailored classes that satisfy the requirements of Rule 23.

The Seventh Circuit's standard also fundamentally alters the Rule 23 class certification process, which, as petitioners have demonstrated, Pet. 1, 8, 30, often is dispositive in large-scale class actions. Given that class actions already induce "blackmail settlements" in the circuits that properly place the burden on plaintiffs to show that all of the Rule 23 requirements are satisfied, see Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973), the dynamics that induce such settlements will be overwhelmingly powerful in the Seventh Circuit, which has shifted this substantial burden to defendants. It goes without saying that plaintiffs in the Seventh Circuit will take full advantage of this shift; indeed, as petitioners point out, Pet. 32, they already are doing so.

The costs of the Seventh Circuit's approach are substantial, as this case illustrates. The court of appeals acknowledged that "the [putative] class has more than a thousand members" and that "determining the value" of the class members' claims would have to be done on an individualized basis. Pet. App. 11a-12a. Yet it held that petitioners should have deposed a sufficiently large sample of the putative class (and presumably sought and reviewed supporting documents and financial records for each and every putative plaintiff) as to permit a reliable estimate – presumably by one or more experts – of the number of noninjured members in *plaintiffs'* proposed class. Such a detailed and sophisticated study in a complex commodities trading case – essentially duplicating the fact-gathering and analysis the plaintiffs would have to undertake in the damages phase of an eventual trial – would consume substantial time and resources.

Requiring *defendants* to shoulder this burden at the *class certification* stage of putative Rule 23 actions therefore fundamentally alters their settlement incentives – particularly in complex securities, antitrust, and commodities cases. *See* Pet. App. 11a (acknowledging that this lawsuit involves "a multi-hundred-million-dollar claim" that will require "protracted and costly litigation"). In such cases, the very act of opposing class certification will be daunting for many defendants, or even cost-prohibitive. Thus, not only will defendants in such cases face enormous pressure to settle in the circumstance where a class is certified, but they also will face pressure to reach early settlements with plaintiffs solely to avoid contentious and costly class certification proceedings. Such settlements that are driven by litigation costs do nothing to vindicate the purposes of the substantive statutes or common-law causes of action at issue and merely represent a wealth transfer to opportunistic plaintiffs (and their lawyers). Rule 23 was never intended to create such incentives or to facilitate such outcomes, yet this will be the unavoidable consequence of the standards established by the court of appeals.[5] Accordingly, the court of appeals' approach is fundamentally flawed and warrants this Court's review.

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[5] The increased prospect of "wealth transfer" settlements created by the decision below is particularly unwelcome, but also particularly likely, in the current economic downturn. *See* Cornerstone Research, *Securities Class Action Filings, 2008: A Year in Review* 2 (2009), *available at* http://securities.stanford.edu/clearinghouse_research/2008_YIR/20090106_YIR08_Full_Report.pdf (noting that "[f]ederal securities class action activity in 2008 was dominated by a wave of litigation against firms in the financial services sector").

III. THE CIRCUIT CONFLICTS AT ISSUE FALL SQUARELY WITHIN THE COURT'S TRADITIONAL DUTY TO ENSURE UNIFORMITY ON ISSUES OF FEDERAL PROCEDURE AND, IF LEFT UNRESOLVED, WILL INCREASE FORUM-SHOPPING.

Even aside from the flaws in the court of appeals' holdings, this Court's intervention is necessary to remedy the current lack of uniformity on potentially dispositive issues of class action procedure. It goes without saying that standards for federal procedure should be uniform so that parties do not obtain disparate outcomes merely by virtue of geography. Indeed, the very purpose of the Federal Rules of Civil Procedure was to create a "'single uniform system of procedure.'" Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 Mercer L. Rev. 757, 780 (1995) (quoting Charles E. Clark, *The Challenge of a New Federal Civil Procedure*, 20 Cornell L.Q. 443, 448 (1935)). Congress charged this Court with the responsibility to "prescribe uniform Rules to govern the 'practice and procedure' of the federal district courts and courts of appeals." *Burlington N. R.R.* v. *Woods*, 480 U.S. 1, 5 n.3 (1987) (quoting 28 U.S.C. § 2072). Accordingly, parties deserve uniform interpretation and application of Rule 23; only this Court can ensure that it is applied consistently.

Moreover, variant practices among federal courts on important issues of procedure, like the Rule 23 issues presented here, inevitably give rise to forum shopping. When procedural rules differ among available forums, plaintiffs will select the forum that they perceive to be the most favorable to them. Forum shopping is undesirable because it results in

unfairness, as well as inefficiencies from added costs to the parties and courts. Chemerinsky & Friedman, *supra* at 782-83; see also James D. Cox, Randall S. Thomas & Lynn Bai, *Do Differences in Pleading Standards Cause Forum Shopping in Securities Class Actions?: Doctrinal and Empirical Analyses*, 2009 Wis. L. Rev. 421, 452 (2009) (forum-shopping "undermines substantive law, overburdens jurisdictions with the most plaintiff-friendly approach, tends to place the suit in a locale that is removed from the source of the contest so that the litigants' expenses are greater, and perpetuates a negative perception of the fairness of the legal system").

The lack of uniformity here regarding whether uninjured plaintiffs can be included in class actions and who has the burden to establish the appropriateness of class certification provides a strong incentive for plaintiffs to choose to litigate in the Seventh Circuit. As noted, class action certification is a high-stakes issue that effectively resolves many cases before they ever reach the merits. Given the central importance of class certification, plaintiffs will seek out and be drawn to jurisdictions with procedural rules that favor and facilitate class certification. See Cox, Thomas & Bai, *supra* at 439 (noting that the liberal venue provisions of the federal securities laws provide plaintiffs' counsel with "essentially unlimited choices of where to file").

The standards adopted by the Seventh Circuit in the decision below do precisely that. The court of appeals' inversion of the burden of proof allows plaintiffs to obtain class certification more readily and its approval of classes that contain uninjured plaintiffs places enormous pressure on defendants to settle. This gives plaintiffs a clear incentive to file

putative class actions in district courts in the Seventh Circuit. Indeed, as noted, class action plaintiffs and their attorneys are already touting the Seventh Circuit's plaintiff-friendly rules. Accordingly, if left uncorrected, the decision below will result in forum-shopping that will serve no useful purpose and that will unfairly force defendants to settle with plaintiffs who have suffered no injury – or even benefited – at their hands. Because the decision below presents at least two fundamental and recurring issues concerning the proper interpretation of Rule 23 that will unfairly distort the litigation process in large class actions, the Court should grant certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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